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No. 275

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and THE OHIO RIVER COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellant, Chicago & Eastern Illinois Railroad Company (C&EI) and The Ohio River Company (River Company) submit this brief in opposition to the motions to affirm filed by the United States of America and the Interstate Commerce Commission (Government motion) and by the intervening defendants (Eastern Railroad motion).

The motions to affirm are addressed not to the report of the Commission as written but to the report as govern-

ment counsel might have written it. The report as written does not accept protestants' study of rail costs with three specified adjustments. As written, the report indicates only that protestants' study was generally accepted, but restated so as to produce different indicated amounts in eight of the ten service catagories shown in an appended table. The parties were left to reconstruct the restated answers from the record, and thus to determine, if possible, which of their opposing contentions had been accepted and which rejected. Only government counsel, privy to the Commission's staff and underlying records, could reconstruct the Commission's cost determination from the record, or nearly so. (They had difficulty with Brewer yard switching.)

Appellants seek no ruling to require disclosure of arithmetical trivia. The first question raised in the jurisdictional statement is directed to whether the facts assumed and procedures followed by the Commission in reaching a dispositive determination of carrier costs are set forth with sufficient clarity and precision to inform the parties and a reviewing court that there was a rational basis for the Commission's order. A reasoned surmise as to the nature of that rational basis is not enough. Assurances given by counsel who must defend the Commission's order as to what the Commission did or did not do come too late. The rational basis for a determinative cost conclusion must be contained in the report itself, not in a deductive reconstruction of the decisional process.*

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* On page 4 of the Government motion, the Commission's rail cost determination is described. The supporting references are not to the Commission report; but to the findings of fact in the lower court, which, in turn, substantially represent the proposed findings of fact submitted by counsel for the Government and for the Eastern Railroads.

Both motions defend the application of a 2.9% trending factor to barge cost on the ground that there was no contrary evidence. (Government motion footnote 5, page 6, and the Eastern Railroad motion, page 11.) This disregards the fact, acknowledged at page 3 of the Eastern Railroad Motion, that the Commission had accepted, for the sake of decision at least, appellants' assertion that the rate in issue was an initial rate. The burden, therefore, rested upon those attacking it, not upon the carrier proposing it.

The argument is made with respect to the second question presented that it was not preserved for court review, and that, in all events, the discriminatory division of the all-rail rate with the Louisville & Nashville Railroad Company applies from a different and non-competitive origin rate group. But the section 3(4) argument was vigorously pressed before the Commission, and, as both Government counsel and counsel for the Eastern Railroads concede, before the lower court in written and oral argument. The point is sufficiently included within the complaint in the general allegation contained in paragraph 11G.

The $4.75 per ton rate, of which the C&EI accepts only $1.66 for its haul from Evansville to Chicago, applies from "Eastern High Volatile District" to Chicago. (Ex. 1 before the Commission) This is the same rate district from which coal is transported to the river for movement via the River Company to interchange with the C&EI at Mt. Vernon, and thence beyond to Chicago. The $4.75 rate was, in fact, established in 1959 so as to equalize the then-existing charges via the competitive rail-water-rail route. See *Eastern Coal to Chicago, Ill.*, 306 ICC 195 (Div. 2, 1959) which, at page 197, reconstructed the through rail-river-rail charge from the high volatile ("Inner Crescent") district.

CONCLUSION.

For the reasons stated herein, and in Appellants' Jurisdictional Statement, it is submitted that the questions presented by this appeal are substantial and important and this Court should note probable jurisdiction.

Respectfully submitted,

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